APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 703

JACK ALLEN BARBER, PETITIONER

vs.

RAY H. PAGE, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 24, 1967
CERTIORARI GRANTED OCTOBER 9, 1967

Supreme Court of the United States

OCTOBER TERM, 1967

No. 703

JACK ALLEN BARBER, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol. A]

C. E. BARNES FOR APPELLANT
CHARLES L. OWENS FOR APPELLEE

No. 1685 Misc.

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9015

JACK ALLEN BARBER, APPELLANT

vs.

STATE OF OKLAHOMA, APPELLEE

Appeal from the United States District Court for the Eastern District of Oklahoma

---

Filed, United States Court of Appeals Tenth Circuit
Aug. 26, 1966, Robert B. Cartwright, Clerk

Before Judges Breitenstein, Aldrich, Kerr

[fol. B]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 5676, Civil

Pleas and Proceedings before The Honorable Edwin Langley, Judge of the United States District Court for the Eastern District of Oklahoma, presiding in the following entitled cause:

JACK ALLEN BARBER, PETITIONER

vs.

STATE OF OKLAHOMA, RESPONDENT

Filed, United States Court of Appeals Tenth Circuit
Aug. 26, 1966, Robert B. Cartwright, Clerk

[fol. 1]

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

GREETING:

Whereas, lately in the United States District Court for the Eastern District of Oklahoma, before you, or some of you in a cause between Jack Allen Barber, plaintiff and The State of Oklahoma, et al., defendant, No. 5676-Civil, the judgment of the said district court was entered in said cause on March 19, 1965.

as by the inspection of the transcript of the record _____ _____ of the said District Court, which was brought into the United States Court of Appeals, Tenth Circuit, by virtue of an appeal by Jack Allen Barber _____ _____ agreeably to the act of Congress, _____ _____ in such case made and provided, fully and at large appears:

AND WHEREAS, at the November Term, in the year of our Lord one thousand nine hundred and sixty-six, the said cause came on to be heard before the said United States Court of Appeals, on the transcript of the record from the said district court and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of dismissal is set aside and the case is remanded to the United States District Court for the Eastern District of Oklahoma for further proceedings in accordance with the opinion of the court.

January 3, 1966.

[fol. 2] You, therefore, are hereby commanded that such further _____ proceedings be had in said cause, in accordance with the opinion and judgment of this court _____ as according to right and justice, and the laws of the United States, ought to be had, _____.

WITNESS, the Honorable EARL WARREN, Chief Justice of the United States, the 10th day of February, in the year of our Lord one thousand nine hundred and sixty-six.

COSTS OF _____

Clerk: Flat Fee $_____)
Preparation of)
printed record $_____)
Printing record $_____)
_____)
$_____)

(Costs of appellant in forma pauperis unpaid, $25.00)

/s/ ROBERT B. CARTWRIGHT
Clerk of the United States Court
of Appeals, Tenth Circuit

No. 8207

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term, 1966

JACK ALLEN BARBER, APPELLANT

vs.

RAY H. PAGE, Warden, Oklahoma State Penitentiary, APPELLEE

MANDATE

Filed, Feb. 14, 1966, JOHN B. FINK, Clerk, U.S. District Court

By LV
Deputy Clerk

[fol. 3]

HABEAS CORPUS D.C. Form 10

MARSHALS DOCKET NO. 131-66

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil No. 5676

JACK ALLEN BARBER

vs.

THE STATE OF OKLA.

Received Mar. 30, 1966, U.S. Marshal's Office Muskogee, Oklahoma

To Ray H. Page, Warden, Oklahoma State Penitentiary, McAlester, Oklahoma

YOU ARE HEREBY COMMANDED, to have the body of Jack Allen Barber by you restrained of his liberty, as it is said, by whatsoever names detained, together with the day and cause of him being taken and detained, before the Honorable Edwin Langley, Judge of the United States District Court for the Eastern District of Oklahoma, at the court room of said Court, in the City of McAlester, Oklahoma at 10:00 o'clock A.m., on the 13th day of April, 1966, then and there to do, submit to and receive whatsoever the said Judge shall then and there determine in that behalf; and have you then and there this writ.

WITNESS the Honorable Edwin Langley
United States District Judge at Muskogee, Oklahoma
this 30th day of March, A.D. 1966,

JOHN B. FINK
Clerk

By /s/ ARDYCE BUSE
Deputy Clerk.

Marshal's Return

I hereby certify & return that I received this Habeas Corpus in Muskogee, Okla. on 3-30-66 and on 3-30-66 at 12:45 pm at the Okla. State Penitentiary, McAlester, Okla. I served Ray H. Page Warden, by serving his sec. Joe Hawkins.

JACKIE V. ROBERTSON, U.S. Marshal

By: /s/ MACK HYDE JR.
MACK HYDE, JR. Deputy Marshal

Fee $ 3.00
Mileage 15.60
Total $18.60

Filed April 4, 1966.

[fol. 12]

ORDER

By order entered herein on March 19, 1965, by the Honorable Luther Bohenon, a judge of this court, the petitioner's application for writ of habeas corpus was dismissed after an evidentiary hearing, the court finding that the petitioner had not been deprived of his constitutional rights in the proceedings leading to the judgment and sentence pursuant to which he is now imprisoned. On appeal, the order was set aside and the case remanded for determination of whether the petitioner had exhausted his state remedies at the time application for the writ was filed in this court. A hearing was then held as directed, with the petitioner present, after which time was allowed for the submission of briefs.

Upon consideration of the evidence and a review of the file, including examination of the briefs, the court finds that at the time application for the writ was filed the petitioner had in fact exhausted the remedies available to him in the state courts. The specific area of inquiry here is whether the issue of confrontation of witnesses as a constitutional question was presented to the Oklahoma Court of Criminal Appeals on the appeal of the case following trial and conviction, and if not, whether any provision exists for the presentation of the issue now. At the hearing there was admitted in evidence without objection the brief of the petitioner on the appeal of his case to the Oklahoma appellate court. As Proposition 2 in the brief it was argued extensively that the use of a transcript without a showing of the exercise of diligence to secure the presence of the witness constituted prejudicial error, and one of the arguments on this point was that to do so was "not in keeping with the spirit and letter of the constitutional guarantee that the defendant in a criminal action has a right to be confronted face to face with the witnesses against him". The court is of the opinion that this was sufficient to raise the question as a constitutional issue. The fact that the Oklahoma Court of Criminal Appeals refused or neglected to consider the matter on that basis ought not be determinative.

Assuming, however, that the question was not adequately presented as a constitutional issue, under the current statutes and decisions in Oklahoma it cannot now be raised in the Oklahoma courts. The recently passed statute authorizing delayed appeals, 22 O.S.A. 1073, applies only to situations where a person convicted of a crime has been deprived of his constitutional right of appeal. No such denial of a constitutional right is here involved. Review under Oklahoma's habeas corpus statutes is largely limited to cases where no appeal has been [fol. 13] taken. A recent statement of the law in this state was made by the Oklahoma Court of Criminal Appeals in the case of Hampton v. Page, 37 O.B.A.J. 577 (March 19, 1966). In that case, in its syllabus, the court said:

> "Where petitioner has appealed from judgment of conviction, and judgment of conviction has been affirmed, and questions raised in habeas corpus proceedings were in evidence and known to petitioner at the time of appeal, and were matters which properly should have been presented by appeal, the Court of Criminal Appeals will not issue a writ of habeas corpus."

This court is of the opinion, therefore, and so finds, there is no remedy whereby the constitutional issue of confrontation can be presented to the Oklahoma courts by the petitioner. Accordingly, since the petitioner had exhausted his state remedies at the time of filing his petition for writ of habeas corpus in this court, the petition should be denied for the reasons stated in the order of this court heretofore referred to, entered on March 19, 1965.

IT IS THEREFORE ORDERED that the petition be and the same hereby is denied, and this action is dismissed.

/s/ EDWIN LANGLEY
District Judge

Filed June 20, 1966.

[fol. 14]

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

Comes now the petitioner, Jack Allen Barber, by his attorney David K. Petty, and moves the court for an order permitting petitioner to prosecute an appeal from the judgment entered herein on the 20th day of June, 1966, in forma pauperis, pursuant to the provisions of title 28 United States Code, Section 1915, and in support thereof, attaches the affidavit of said petitioner. Petitioner further requests an order of this court directing the court reporter to transcribe and furnish to the Clerk of this court an original and three copies of the record of the proceedings had in the above case on April 13, 1966, at the expense of the United States of America.

JACK ALLEN BARBER, Petitioner
BY: /s/ DAVID K. PETTY
DAVID K. PETTY
Attorney for Petitioner
P. O. Drawer 130
McAlester, Oklahoma

I certify that a copy of the foregoing Motion was mailed this 28th day of June, 1966, to Attorney General, State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma, Attorney for respondent.

/s/ DAVID K. PETTY
DAVID K. PETTY

Filed June 29, 1966.

AFFIDAVIT OF JACK ALLEN BARBER, PETITIONER

UNITED STATES OF AMERICA)
) ss:
EASTERN DISTRICT OF OKLAHOMA)

Jack Allen Barber, being duly sworn, deposes and says:

1. I am a citizen of the United States and the petitioner in the above entitled action.

2. I desire to prosecute an appeal from the judgment entered in the above entitled action, but because of my poverty I am unable to pay the costs of such appeal or to give security therefore.

3. I believe that I am entitled to the redress I seek by such an appeal, and that such appeal presents substantial questions.

4. The nature of the questions to be presented upon such appeal is as follows:

The trial court erred in failing to find that my constitutional right to be confronted with witnesses against me had been violated in my trial by the State of Oklahoma by the admission in evidence at said trial a transcript of testimony taken at my preliminary hearing.

[fol. 15] The trial court erred in denying my petition for writ of habeas corpus and in dismissing my action:

WHEREFORE, affiant prays that he may have leave to prosecute the said appeal in forma pauperis.

/s/ JACK ALLEN BARBER
JACK ALLEN BARBER, Petitioner

Subscribed and sworn to before me this 27 day of June, 1966.

/s/ HELEN O. LEE
Notary Public

My Commission Expires: 3-22-69
Filed June 29, 1966.

[fol. 16]

MOTION FOR CERTIFICATE OF PROBABLE CAUSE

Comes now the petitioner by his attorney, David K. Petty, and moves the Court to grant petitioner a Certificate of Probable Cause for Appeal for the following reasons:

On March 19, 1965, by order of the court the Honorable Luther Bohanon presiding this petitioner's application for Writ of Habeas Corpus then before the court was dismissed after an evidentary hearing.

On April 13, 1965, the Honorable Luther Bohanon issued a Certificate of Probable Cause for Appeal to this petitioner. Petitioner brought his appeal before the United States Court of Appeals for the Tenth Circuit which remanded the case to the trial court for a determination of whether the petitioner has exhausted his state remedies at the time his application for the writ was filed. On June 20, 1966, this court, the Honorable Edwin Langley presiding, found that petitioner had in fact exhausted his state remedies and denied the petitioner's application for the writ and dismissed the action. The reasons for the Honorable Luther Bohanon granting the Certificate of Probable Cause for Appeal to this petitioner on April 13, 1965, are still present and a Certificate of Probable Cause for Appeal from the judgment of this court entered on June 20, 1966, should be issued by this court.

Petitioner has alleged and offered evidence that his constitutional right to be confronted with witnesses against him was violated at his trial by the State of Oklahoma by the admission into evidence of the transcript of testimony of a witness against him which testimony had been taken at petitioner's preliminary hearing. Petitioner did not have the benefit of cross-examination of the witness whose testimony was admitted by transcript in petitioner's trial in the State Court and said witness was not present at petitioner's trial in the State Court for interrogation or cross-examination by petitioner.

Recent decisions by the United States Supreme Court have clarified and emphasized a defendant's right to be

confronted with witnesses against him as guaranteed by the United States Constitution and there is probable cause for an appeal by the petitioner on the ground that his constitutional right to be confronted with witnesses against him was violative in his trial by the State of Oklahoma.

WHEREFORE, Petitioner respectfully requests that this honorable court grant petitioner a Certificate of Probable Cause for Appeal.

JACK ALLEN BARBER, Petitioner

BY: /s/ DAVID K. PETTY
DAVID K. PETTY, Attorney for Petitioner
P. O. Drawer 130
McAlester, Oklahoma

[fol. 17] I certify that a copy of the foregoing Motion was mailed this 28th day of June, 1966, to Attorney General, State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma, Attorney for respondent.

/s/ DAVID K. PETTY
DAVID K. PETTY

Filed June 29, 1966.

[fol. 18]

CERTIFICATE OF PROBABLE CAUSE

Now on this 29 day of June, 1966, this matter comes on for hearing upon motion of petitioner for Certificate of Probable Cause for Appeal and the Court after having heard the issues presented and having denied the relief sought by petitioner finds that probable cause exists for appeal

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT Certificate of Probable cause of appeal do issue herein.

/s/ EDWIN LANGLEY
United States District Judge

Filed June 29, 1966.

[fol. 19]

ORDER ALLOWING APPEAL IN FORMA PAUPERIS

Now on this 29 day of June, 1966, upon motion of the petitioner to appeal in forma pauperis from the order denying relief sought by said petitioner and it appearing that the petitioner is without means and that the appeal is not frivolous and is in good faith;

IT IS THEREFORE ORDERED that the appeal be allowed in forma pauperis.

IT IS FURTHER ORDERED that the court reporter transcribe and furnish to the clerk of this court an original and three (3) copies of the record of the proceedings had in the above case on April 13, 1966, at the expense of the United States of America.

/s/ EDWIN LANGLEY
United States District Judge

Filed June 29, 1966.

[fol. 20] NOTICE OF APPEAL

To State of Oklahoma, and Ray Page, Warden, Oklahoma State Penitentiary, Respondents, and to Charles Nesbitt, Attorney General for the State of Oklahoma, Attorney for Respondents:

You, and each of you, will please take notice that the petitioner, Jack Allen Barber, in the above-entitled cause, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the judgment and order denying petitioner's application for a Writ of Habeas Corpus entered in the above-entitled cause on the 20th day of June, 1966, and that the certified transcript of record will be filed in said appellate court within forty days from the filing of this notice.

Dated June 27, 1966.

/s/ DAVID K. PETTY
DAVID K. PETTY
Attorney for Petitioner

CERTIFICATE OF SERVICE

A true and correct copy of the above instrument was mailed to Mr. Charles Nesbitt, Attorney General of the State of Oklahoma, Oklahoma State Capitol Building, Oklahoma City, Oklahoma, on this 28th day of June, 1966.

/s/ DAVID K. PETTY
DAVID K. PETTY
Attorney for Appellant

Filed June 29, 1966.

[fol. 21] PLAINTIFF'S EXHIBIT 1

SUPPLEMENTAL JURISDICTION

Comes now, Jack Allen Barber, petitioner in the instant cause, who seeks further to invoke jurisdiction of the matter at hand to this Honorable Court, with the following words and figures:

(a) The United States Supreme Court held in; U.S. vs. Morgan, 74 S. Ct. 247, that:

(1) A Writ of Coram Nobis was available at common law, to correct errors of fact, and was allowed without limitation of time for facts effecting the validity and regularity of judgement in both civil and criminal courts.

(2) In behalf of unfortunates, the federal courts should act to do justice, if record makes plain a right to relief.

x (3) Writ of Error Coram Nobis has power in the "All Writs" section of judicial code.

(4) Federal Rules, Criminal Proceedure, rule 35, 18 U.S.C.A.; 28 U.S.C.A. Sections 1651 (a), 2255.

(5) Continuation of litigation after final judgement and exhausting or waiver of any statutory right of review, should be allowed through extraordinary remedy of Writ of Error Coram Nobis, only under circumstances compelling such action for purpose of achieving justice.

(b) Petitioner states that immediately after receiving notice of the denial of his application for rehearing by The State Court of Criminal Appeals, he was placed in a section of the prison which disallowed any communication with the Supreme Court of the United States and/or his attorney of record, which was necessary to his preparation and filing for certiorari in said Supreme Court.

(1) Petitioner did attempt, diligently, to file for certiorari, but to no avail and through no fault of his own.

Wherefore; Petitioner states that he has exhausted all remedies available to him, in that he was denied the privilege of communication, for the purpose of filing for certiorari in The United States Supreme Court.

Petitioner further states that a Writ of Error Coram Nobis has long been accepted as a collatoral Writ of Error between state and federal jurisdictions, and necessarily so, for in many case's, it is the only avenue by which a wrong may be made right.

Respectively submitted:

/s/ JACK ALLEN BARBER
JACK ALLEN BARBER
67027, Petitioner

Finis

Attest: Notary not available

/s/ OTIS R. WOODRING
Witness

/s/ HERMAN L. BARNETT
Witness

Filed Nov. 17, 1964.

[fol. 25]

PLAINTIFF'S EXHIBIT 2

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. A-13252

JACK ALLEN BARBER, PLAINTIFF IN ERROR

vs.

STATE OF OKLAHOMA, DEFENDANT IN ERROR

BRIEF IN SUPPORT OF PETITION IN ERROR

Statement of Facts

On August 25, 1961, plaintiff in error, Jack Allen Barber, was charged by Information in the District Court of Tulsa County, Oklahoma, with the crime of robbery with firearms conjoint. The Information was styled "State of Oklahoma, plaintiff, vs. Max Leroy Steed, Charles Henry Woods, Jack Allen Barber and E. M. (Pete) Bishop, defendants." The Information charged that the offense was committed on or about the 30th day of July, 1961, in Tulsa County. Defendant was arraigned on September 30, 1961, entered a plea of not guilty, and the case was set for trial on the October District Court docket. The case was passed, and on November 8, 1961, a co-defendant requested a severance and the same was granted. The within case was passed to, but continued from the December, January and February dockets. On February 22, 1962, permission was granted the State to file an amended Information.

The trial of the case before a jury commenced on March 5, 1962, and continued through March 8, 1962. At the conclusion of the trial and following instructions and argument of counsel, the jury retired, deliberated, and returned a verdict of guilty against the defendant. On March 9, 1962, the State read the jury the Information on a former conviction and presented evidence, the Court instructed on same and argument of counsel was heard. The jury retired, deliberated and returned, and found

the defendant guilty of robbery with firearms after former conviction of a felony, and assessed his punishment at fifteen years in the state penitentiary.

On March 19, 1962, the State, the defendant and defendant's attorney being present, the Court sentenced defendant to a term of fifteen years in the state penitentiary.

From said sentence, Jack Allen Barber has timely filed an appeal.

* * * *

[fol. 27] PROPOSITION NO. 2

THE COURT ERRED IN ALLOWING THE TESTIMONY OF THE STATE'S KEY WITNESS TO BE INTRODUCED BY TRANSCRIPT

The State, over the continuous and strenuous objection of the defendant, was allowed to introduce the testimony of Charles Henry Woods, the State's key witness, by transcript, taken at the preliminary hearing. We contend that the Court committed reversible error in allowing said testimony to be introduced by transcript. A reading of the Case-made will show that the State's case against the defendant Barber was predicated primarily and almost exclusively upon the testimony of Woods.

Prior to the reading of Woods' testimony from the transcript, taken at the preliminary hearing, defendant objected to the introduction of said evidence by transcript (C-M 50). In support of said objection the defendant made the following offer of proof:

(1) That Charles Henry Woods is a co-defendant in the instant case;

(2) That Charles Henry Woods was in custody and was confined to the Tulsa County jail, awaiting a preliminary hearing on the instant charge, and that he remained in the custody of the State of Oklahoma and confined to said county jail up to and through August 22, 1961, at which time he testified in the preliminary hearing, the transcript of which was being offered in testimony;

[fol. 28] (3) That between the time the State of Oklahoma took custody of Woods and the time he testified in the preliminary hearing in the instant case, the federal government filed three charges against him;

(4) That sometime after the preliminary hearing referred to above, the State of Oklahoma voluntarily released custody of Woods to the federal government;

(5) That at the time custody of Woods was voluntarily released by the State of Oklahoma to the federal government, the State of Oklahoma had every reason to believe, and did believe that Charles Henry Woods was to enter a plea of guilty to one or more of the federal charges and would be sentenced to a federal institution to serve some period of years;

(6) That at no time since the instant case has been set for trial has the State of Oklahoma requested the federal government or any of its authorities, including the Bureau of Prisons, the Attorney General of the United States, or the Department of Justice to bring Charles Henry Woods to Tulsa County, Oklahoma, to testify in the instant case;

(7) That the State of Oklahoma has made no attempt through the issuance of a subpoena to secure the attendance at the trial for the purpose of testifying the person of Charles Henry Woods;

(8) That since the preliminary hearing, Woods has entered a plea of guilty to an offense commonly known as the Dyer Act and has been sentenced to serve a term of five years in the federal penitentiary;

(9) That in addition, Woods has entered a plea of guilty to the offense of transporting stolen property in interstate commerce exceeding the value of $5,000.00, and has been sentenced to serve eight years in the federal penitentiary;

(10) That Charles Henry Woods is in custody of the federal government, confined to the federal prison located at Texarkana, Texas, and that said prison is outside the State of Oklahoma and outside the jurisdiction of this Court.

The trial court denied the offer of proof, to which ruling the defendant exeepted, and overruled the objection

of the defendant that the testimony of Woods be introduced by transcript, and permitted the offer of testimony of the witness Woods by and through the transcript of testimony of said Woods, to which ruling the defendant excepted. It should be pointed out here that there is no evidence in the record other than the offer of proof set out above, made by the defendant and denied by the Court, tending to show in any way why the witness, Charles Henry Woods, could not be present to testify in person and confront this defendant, as required by the Constitution and the Statutes of the State of Oklahoma.

[fol. 29] In this connection there is absolutely no evidence in the record other than the offer of proof, which was denied, to prove where the witness was. For all we know he could have been in the County jail on the eighth floor of the County Court House where the trial was proceeding. The Court and County Attorney took the position that it was incumbent upon the defendant to show why the transcript should not be admitted. As a result of this erronious theory, the County Attorney failed to recognize that the law actually imposes upon the State the duty to produce evidence why the transcript *should* be admitted, and as a result failed to produce one iota of evidence as to why the transcript should be introduced.

Article II, Sec. 20, of the Oklahoma State Constitution provides:

> "In all criminal prosecutions the accused shall have the right to * * * be confronted with the witnesses against him * * *"

This announcement is further carried out in Sec. 13, Title 22, of the Oklahoma Statutes Annotated, wherein it is stated:

> "In a criminal action the defendant is entitled:
>
> (3) to produce witnesses on his behalf and to be confronted with the witnesses against him in the presence of the court."

The Oklahoma court has generally allowed an exception to this Constitutional and statutory protection in in-

stances where a transcript of the testimony of the witness is offered which was taken at a preliminary hearing in the same cause. *Before such transcript may be offered, however, it is incumbent upon the State to show that they have used reasonable diligence in procurring the presence of the witness to testify, and* that he cannot be produced for any of the following reasons:

> (1) That the witness is dead; (2) has become insane, (3) left the state, (4) is sick and unable to testify, or (5) his whereabouts cannot with due diligence be ascertained. *Davis vs. State*, 201 P. 1001, 20 Okl. Crim. 203.

Everyone knew that the witness Woods was not dead, insane, or ill, and that his whereabouts were known at all times. In fact, the circumstances as indicated by the offer of proof indicate a design and strategy on the part of the County Attorney to provide for Woods' absence at the time of trial. This found to be true should be conclusive grounds for reversal. If, however, the Court is not fully persuaded, we respectfully ask the Court to search the record for one shred of evidence showing *any* effort, much less due diligence, on the part of the County Attorney, to produce the witness. It is not there, the County Attorney being willing to rely upon the mere fact that the witness was not in the State of Oklahoma to support his offer. This is not enough.

In the case of *Scott* v. *State*, 43 Okl. Crim. 232, 278 P. 393, the court said:

[fol. 30] "This court has repeatedly held that the rule admitting the transcript of the evidence of an absent witness as his deposition on final trial grows out of circumstances of necessity. The transcript or deposition of the testifying witness shall be excluded in all cases where the witness can be produced in person. The main reason for this is that the accused may desire to cross-examine the witness further and that the jury be given an opportunity to observe the witness and his demeanor on the witness stand. This question has been before this court a number of times.

"The case of Davis v. State, supra, in which the limitations of the rule were discussed and stated, supported by authorities therein cited, is in harmony with the statements made herein. It is not unusual; the cross-examination of the witness in the preliminary trial is more or less perfunctory, and by the time the case is on final trial the defendant has had more time for research and is better able to conduct a thorough cross-examination; and if it is proper for the witness to be produced, it is the right of the defendant to have him present. *Diligent effort made in good faith to produce the witness at the trial should be shown.*" Golden vs. State, 23 Okl. Crim. 243, 214 P. 946.

"We think this court in former opinions has followed a rule sufficiently liberal in permitting the testimony of the witness taken at a former trial or a preliminary hearing to be used in the absence of the witness, and that this should not by judicial construction extend or enlarge upon the rule announced in its former decisions. Cases perhaps would arise where the prosecuting officer might prefer to have the testimony taken at a former trial read to the jury rather than to run the risk of having the witness appear in open court on the witness stand, to be subjected to the rigid cross-examination where the jury could see the witness and judge of his demeanor on the witness stand. *To lay down a rule that a mere showing that the witness is another state, without requiring a showing that due diligence had been used to secure the attendance of the witness, might enable public prosecutors and others, if it appear to their interests, to cause witnesses to be absent from the jurisdiction of the court to escape further cross-examination. * * * What we do mean to hold is that it would be dangerous to relax the rule that reasonable effort and diligence to produce the witness should be shown.*

Quoting from *Davis* v. *State*, supra, to say that no diligence is required to produce the witness in open court, where it is possible to do so is

"not in keeping with the spirit or the letter of the Constitutional guarantee that the defendant in a criminal action has a right to be confronted face-to-face with the witnesses against him."

There is absolutely no showing whatsoever that the State exercised any diligence to return Woods to testify. For example, there is no showing the County Attorney ever contacted any federal officer or the director of the federal penitentiary, or the warden of the federal prison, requesting the return of Woods to Tulsa to testify. [fol. 31] The importance of the testimony contained in the transcript cannot be minimized. Without this testimony the State would have been unable to withstand a demurrer. In presenting evidence of such importance, it is basic that the defendant be confronted with the witness giving such testimony. The inflection given by the reader of the transcript, his demeanor on the witness stand (in this instance a trained investigator from the County Attorney's office), may be such as to leave an impression on the jury which is opposite to that of the absent witness. This is particularly true in this case since the credibility of the witness could not be judged by the jury, and his credibility was subject to great question because between the time of his testimony in the preliminary trial and the reading of his testimony at the time of trial, Woods had been twice convicted in the federal court and was then serving a term in the federal penitentiary. This fact could not be shown to the jury.

Again we ask the Court to search the record for any evidence showing just the slightest effort of the State to produce this witness, and we earnestly submit that on finding none (since there is none), rule that the trial court erred in allowing the testimony of such witness to be introduced by transcript.

* * * *

[fol. 37] PROPOSITION NO. 7

ERROR OF THE COURT IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS

A reading of the transcript will disclose the importance [fol. 38] of the testimony of the accomplice, Charles Henry "Chuck" Woods, in the State's case. For that reason it was vital that the Court properly instruct the jury concerning the law of accomplice and the corroboration of such testimony.

We invite the Court's attention to Instruction No. 4 given by the Court and appearing at p. 215 of the Case-made, which was the complete instruction given by the Court:

"Instruction No. 4

"You are instructed that a conviction cannot be had upon the testimony of an accomplice or accomplices, unless such testimony is corroborated by other evidence tending to connect the defendant with the offense, and such corroboration is not sufficient if it merely shows the commission of the offense.

"An accomplice includes any person who is connected with the crime by the commission of any unlawful act on his part, transpiring either before or at the time of the commission of said offense, or as a participant therein."

and also to the defendant's requested Instructions 1 and 2 appearing at pp. 220 and 221 of the Case-made:

"Defendant's Requested Instruction No. 1.

"You are instructed that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroborating evidence is not sufficient if it merely tends to show the commission of the offense or the circumstances thereof. This does not mean a separate and complete proof of a crime but only that there should be some evidence of ma-

terial facts in addition to the testimony of the accomplice tending to connect the defendant with the commission of the offense charged. Evidence corroborating an accomplice tending to connect the defendant with the commission of the offense need not be direct but it may be circumstantial only.

"In this connection you are told that it is not sufficient corroboration for this purpose merely to connect defendant with the accomplice or accomplices or other persons participating in the crime, but the evidence must tend to connect the defendant with the crime itself and not simply with its perpetrators, and corroborating evidence may be sufficient, although of itself slight, but it is not sufficient if it merely tends to raise a suspicion of guilt.

"In this connection, you are further told that the witness, Charles H. "Chuck" Woods, was an accomplice as a matter of law within the meaning of this instruction.

"Hankins v. State, 71 P. 2d, 119, 62 Okl. Crim. 252;

Rogers v. State, 48 P. 2d-344, 57 Okl. Crim. 294;
Howerton vs. State, 88 P. 2d 904;
Kennedy vs. State, 83 P. 2d 193"

[fol. 39] *Defendant's Requested Instruction No. 2*

"You are instructed that whether an accomplice has been corroborated as required by statute may be determined by eliminating from the case the accomplice's evidence and examining the evidence of other witnesses to determine whether there is evidence tending to connect defendant with the commission of the offense; and if there is, accomplice is corroborated.

"McNack vs. State, 71 P. 2d 119, 62 Okl. Crim. 252"

We contend that the Court did not fully and sufficiently instruct the jury on the question of accomplice and corroboration in that the Court failed to instruct the jury in the following particulars:

(1) That Charles H. "Chuck" Woods was an accomplice as a matter of law.

In reversing the judgment of the District Court in *Spears* v. *State*, 89 Okl. Crim. 321, 207 P. 2d 363, this Court, after citing an instruction almost verbatim with the instruction given by the court in this case, said as follows:

> "This instruction insofar as it goes is a correct abstract statement of the law; however, there is no other instruction pertaining to the testimony of accomplices nor is the jury advised as to who are accomplices. The court should have given an instruction definin accomplices, *should have told the jury as a matter of law that the witnesses*, Royal Von Daugherty, E. D. Daugherty and John King, Jr., *were accomplices of defendant*, and that the defendant could not be convicted upon the testimony of those witnesses unless their testimony be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

(2) That the court failed to instruct that it is not sufficient corroboration merely to connect the defendant with the accomplice or accomplices or other persons participating in the crime.

In this connection we cite to the Court the decisions cited above under Proposition No. 3, with particular reference to the testimony of Montez Dandridge. That this is clearly the law is enunciated in these cases, and yet when this case was submitted to the jury, under the instructions, they could find guilt if they merely found that the defendant had been in the company of the accomplice at any time. The requested instruction which was refused properly covered this point; the instruction given by the court did not. This is clearly error.

(3) The Court should have defined the word "corroboration" as was requested in defendant's requested instruction No. 2. The courts themselves have gone to great length to define corroboration and when it becomes sufficient, as indicated by the cases heretofore cited. To leave

to the jury that question of corroboration and when it becomes legally sufficient, under the instruction given by the court, would allow the jury to return a verdict of guilty if they found the defendant and the accomplice had breakfast or lunch together the day prior to the crime. This would clearly be error. It would allow the jury to speculate on what facts would constitute sufficient corroboration.

[fol. 40] The instructions requested by the defendant were clear and fairly recite the law of accomplice and corroboration, and should have been given. The failure of the court to give them and to substitute in lieu thereof the instruction he did give on this subject, and which for the reasons cited above did not thoroughly instruct, was error.

* * * *

[fol. 41] CONCLUSION

Without minimizing any of the errors argued in this brief, we wish in conclusion to call the Court's particular attention to Propositions 2, 3, 5 and 7 which point out error of the court that denied the defendant a fair trial, that indicated a passion for conviction on the part of the court as well as the County Attorney, that allowed the jury to consider incompetent evidence under faulty instructions—any one of which standing alone would warrant a reversal.

For these reasons and all of the propositions urged above, we respectfully submit that the conviction and sentence of the defendant, Jack Allen Barber, should be reversed.

TUCKER, BOYD & PARKS
217 West Fifth Street
Tulsa, Oklahoma
Attorneys for Plaintiff in Error

[fol. 42]

PLAINTIFF'S EXHIBIT 3—5676

JACK ALLEN BARBER, Plaintiff in Error

v.

THE STATE OF OKLAHOMA, Defendant in Error

No. A-13252

Court of Criminal Appeals of Oklahoma
Nov. 20, 1963

Rehearing Denied Jan. 15, 1964

The defendant was convicted in the District Court of Tulsa County, Robert L. Wheeler, J., of robbery with firearms after former conviction of felony, and he appealed. The Court of Criminal Appeals, Johnson, J., held that defendant who announced ready for trial and waited until after opening statement by plaintiff had waived objection that robbery information charged only three men on its face while four men were mentioned in body of information, and that testimony of seven witnesses who each partially corroborated testimony of accomplice and each testified to a certain phase of the robbery sufficiently corroborated accomplice's testimony.

Affirmed.

1. Indictment and Information 196(1)

Defendant who announced ready for trial and waited until after opening statement by plaintiff to object that robbery information charged only three men on its face while four men were mentioned in body of information had waived the objection.

[fol. 43] 2. Indictment and Information 133(1), 196(1)

Objections appearing on face of indictment or information, except those relating to jurisdiction of court, subject matter of offense, or question whether facts stated constitute public offense, must be presented by demurrer and are waived if not so presented in proper time.

3. Indictment and Information 133(7)

Remedy to sufficiency of robbery information after announcing ready for trial was by motion objecting to introduction of evidence at time of trial or in arrest of judgment, not by demurrer. 22 Okl.St.Ann. § 512.

4. Indictment and Information 150

In ruling on demurrer to information, trial court must only determine whether information is reasonably certain as to offense charged and is couched in language that enables person of common understanding to know what is intended and that makes it possible for judgment of acquittal or conviction to be bar to subsequent prosecution for same offense.

5. Criminal Law 543(1)

Transcript of testimony which was given at preliminary hearing and taken down in presence of defendant and his counsel who cross-examined witness and which was filed with clerk was admissible where witness was not present for trial and could not be found in jurisdiction because witness was serving two rather extended terms in federal penitentiary.

6. Criminal Law 511(1)

Testimony of seven witnesses who each partially corroborated testimony of robbery accompice and each testified to a certain phase of the robbery sufficiently corroborated accomplice's testimony. 22 Okl.St.Ann. § 742.

7. Criminal Law 511(2)

In face of challenge on appeal to sufficiency of evidence to corroborate accomplice, strongest view warranted of corroborating testimony will be taken and verdict will be upheld if there is corroborating evidence tending to connect defendant with commission of the offense. 22 Okl.St. Ann. § 742.

8. Criminal Law 511(1)

Corroborating evidence is not required to cover every material point testified to by an accomplice or to be suf-

ficient alone to warrant guilty verdict, but if accomplice is corroborated as to one material fact by independent evidence tending to connect defendant with commission of crime, jury may infer that accomplice speaks truth as to all. 22 Okl.St.Ann. § 742.

9. Criminal Law 741(5)

Weight and sufficiency of evidence corroborating accomplice is for jury. 22 Okl.St.Ann. § 742.

10. Criminal Law 1048

Errors to which no exceptions were taken will not be considered on appeal unless jurisdictional or fundamental in character.

11. Criminal Law 1162, 1163(1)

Error alone does not reverse judgments for conviction, but error plus injury is necessary, and burden is upon plaintiff in error to establish prejudice to his substantial rights by the error.

12. Criminal Law 829(1)

Refusal to give requested instructions which were not as concise as those that were given and that fairly stated the law was not reversible error.

13. Criminal Law 822(1)

All instructions given should be considered, and where they fairly and fully present the issues involved and no fundamental error occurs, case will not be reversed on appeal.

14. Criminal Law 829(1)

Refusal of requested instructions is not error where substance of requested instructions is covered by given instructions.

15. Criminal Law 1166(1)

Constitutional provision requiring accused in capital cases to be furnished with list of witnesses called in chief did not entitle defendant to reversal of conviction because

[fol. 44] of use of witness whose name had not been endorsed on information in hearing which concerned former convictions and which was held after defendant was found guilty of crime charged. O.S. 1961 Const. art. 2, § 20.

Syllabus by the Court

1. Objections which appear upon the face of an indictment or information, except those which relate to the jurisdiction of the court, or subject matter of the offense, or that facts stated do not constitute a public offense, must be presented by demurrer, and if not so presented in proper time, they are waived.

2. Defendant's remedy to test sufficiency of the information, after announcing ready for trail, was by motion objecting to introduction of evidence at time of trial or in arrest of judgment, but not by demurrer. 22 O.S.A. § 512.

3. In ruling upon demurrer to information, it was only incumbent on trial court to determine whether information was reasonably certain as to offense charged and was couched in such language as to enable a person of common understanding to know what is intended so that he may prepare his defense, and so that a judgment of acquittal or conviction would be a bar to a subsequent prosecution for the same offense.

4. Where the testimony of the witness was given at the preliminary examination and taken down by the reporter in the presence of the defendant and his counsel, who cross-examined him, and such testimony was filed with the clerk, the transcript is admissible where the witness is not present and cannot be found in the jurisdiction.

5. A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of an offense, or the circumstances thereof. 22 O.S.A. § 742.

6. Where the sufficiency of the evidence to corroborate an accomplice is challenged, Court of Criminal Appeals will take the strongest view of the corroborating testimony that such testimony will warrant, and, if it can say

that there is corroborating evidence tending to connect defendant with the commission of the offense, it will uphold the verdict.

7. It is not essential that corroborating evidence shall cover every material point testified to by an accomplice, or be sufficient alone to warrant a verdict of guilty. If the accomplice is corroborated as to one material fact or facts by independent evidence tending to connect the defendant with the commission of the crime, the jury may from that infer that he speaks the truth as to all. Such corroborating evidence, however, must show more than the mere commission of the offense or circumstances thereof.

8. The weight and sufficiency of corroborating evidence is for the jury, and where the jury has returned its verdict, the Court of Criminal Appeals will take the strongest view of the corroborating testimony that the evidence warrants.

9. Errors to which no exceptions were taken will not be considered on appeal unless they are jurisdictional or fundamental in character.

10. It is not error alone that reverses judgments of conviction of crime in this State, but error plus injury, and the burden is upon the plaintiff in error to establish to the Court of Criminal Appeals the fact that he was prejudiced in his substantial rights by the commission of error.

11. All instructions given by the trial court should be considered, and where they fairly and fully present the issues involved, and no fundamental error occurs whereby the defendant has been prejudiced or deprived of a substantial right, the case will not be reversed on appeal.

12. It is not error for trial court in criminal prosecution to refuse defendant's requested instructions where substance of requested instructions is covered by given instructions.

[fol. 45] Appeal from the District Court of Tulsa County; Robert L. Wheeler, Judge.

Jack Allen Barber was convicted of the crime of robbery with firearms, after former conviction of a felony, and appeals. Affirmed.

Ed Parks, Tulsa, for plaintiff in error.

Mac Q. Williamson, Atty. Gen., Sam H. Latimore, Asst. Atty. Gen., for defendant in error.

JOHNSON, Judge:

On August 25, 1961 the paintiff in error, Jack Allen Barber, hereinafter referred to as defendant, was charged by information in the district court of Tulsa County with the crime of robbery with firearms, conjoint. The information named as defendants Max Leroy Steed, Charles Henry Woods, Jack Allen Barber and B. M. (Pete) Bishop as defendants. The information charge that the offense was committed on or about July 30, 1961 in Tulsa County. This defendant was arraigned on September 30, 1961, entered a plea of not guilty, and the case was set for trial on the October district court docket. The case was passed, and on November 8, 1961, a co-defendant requested a severance, and the same was granted. After several continuances, and on February 22, 1962, the State was granted permission to file an amended information, against this defendant.

On March 8, 1962 the jury returned a verdict finding defendant guilty, and on March 9, 1962 the State read to the jury the information on a former conviction and presented evidence, the court instructed on same, and argument of counsel was heard. The jury found the defendant guilty of robbery with firearms after former conviction of a felony, and assessed his punishment at 15 years in the state penitentiary. Defendant was sentenced on March 19, 1962, and appeal has been perfected to this Court.

[1, 2] Defendant's first proposition is that the court erred in overruling the demurrer of the defendant to the information filed. The accused by counsel had entered a plea of not guilty on his first appearance in court, and had later, when the case was called for trial, through his counsel, announced ready for trial without filing a demurrer to the information. Then after the jury had been selected and sworn, and the opening statement by the plaintiff given, the accused, through his attorney, undertook for the first time to orally demur to the information, on the grounds that there were only three men charged on the face of the information with robbery, while there were four mentioned in the body of the information. This

proposition certainly has no merit for this Court has held that:

> "Objections which appear upon the face of an indictment or information, except those which relate to the jurisdiction of the court, or subject matter of the offense, or that facts stated do not constitute a public offense, must be presented by demurrer, and if not so presented in proper time, they are waived."

Richards v. State, Okl.Cr., 278 P.2d 253; Simpson v. State, 16 Okl.Cr., 533, 185 P. 116; and Roberts v. State, 72 Okl. Cr. 384, 115 P.2d 270.

[3] The defendant's remedy to the sufficiency of the information, after announcing ready for trial, was by motion objecting to introduction of evidence at time of trial or in arrest of judgment, but not by demurrer. Jennings v. State, 92 Okl.Cr. 347, 223 P.2d 562.

[4] And finally this Court has held that in ruling upon a demurrer to the information, it is only incumbent on the trial court to determine whether the information was reasonably certain as to the offense charged and was couched in such language as to enable a person of common understanding to know what is intended, so that he may prepare his defense, and also so that a judgment of acquittal or conviction would be a bar to a subsequent prosecution for the same offense. Johnson v. State, 79 Okl.Cr. 71, 151 P.2d 801.

[fol. 46] The second proposition presented is that the trial court erred, when it allowed the testimony of a key witness for the State to be introduced by transcript. The defendant relies on four cases to sustain his contention, Golden v. State, 23 Okl.Cr. 243, 214 P. 946; Davis v. State, 20 Okl.Cr. 203, 201 P. 1001; Scott v. State, 43 Okl. Cr. 232, 278 P. 393; and Foster v. State, 35 Okl.Cr. 70, 248 P. 847.

Each of these cases was distinguishable from the present case. The Golden case presents a subpoena that was returned with a notation, "not found" endorsed thereon and there was no evidence or showing that the witness was out of the State or out of the jurisdiction of the court. The circumstances in the Davis case showed that the wit-

ness was a resident of Grady County and no subpoena had been issued for him, he had merely orally promised to attend the trial and no effort had been made to serve him. Further evidence showed that he was only temporarily out of the State, therefore the transcript from the preliminary could not be introduced.

In the Foster case the transcript that the State attempted to introduce was one taken in a case other than the one being tried, therefore this Court held that evidence taken in a proceeding in which the defendant was not a party was prejudicial error.

Finally, in the Scott case, the record shows there was great confusion as to the whereabouts of the witness whose testimony the State attempted to introduce by transcript. However, there was no definite proof that he was not within the State of Oklahoma, therefore the Court in an opinion by Judge Davenport held that the transcript could not be introduced.

In the instant case there is no question as to the whereabout of Charles Henry Woods. He had been in the custody of the Federal Government for some time, and was confined in the Federal prison in Texarkana, Texas, at the time of the present trial. This Court has been very explicit in this and as so ably pointed out in the State's brief, "There can be no question under the circumstances of this case."

[5] Where the testimony of the witness was given at a preliminary examination, and taken down by the reporter in the presence of the defendant and his counsel who cross examined him, and such testimony was filed with the clerk, the transcript is admissible where the witness is not present and cannot be found in the jurisdiction. Fitzsimmons v. State, 14 Okl.Cr. 80, 166 P. 453; Jeffries v. State, 13 Okl.Cr. 146, 162 P. 1137; Henry v. State, 10 Okl.Cr. 369, 136 P. 982, 52 L.R.A., N.S., 113; Edwards v. State, 9 Okl.Cr. 306, 131 P. 956, 44 L.R.A., N.S. 701; Valentine v. State, 16 Okl.Cr. 76, 194 P. 254; Clark v. State, 28 Okl. Cr. 31, 228 P. 791.

Counsel for the defendant states that the State made no effort to return Woods for the trial. Under the above rulings, it was not necessary. The witness was certainly out of the State and out of the jurisdiction of the court, as

counsel for the defendant himself admitted when he said the witness was serving two rather extended terms in the Federal Penitentiary. Therefore, you could say that there definitely was a permanency to his absence.

In Serna v. State, 110 Tex.Cr.R. 220, 7 S.W.2d 543, the Court of Criminal Appeals of the State of Texas said:

> "Another objection urged to the reproduction of Teller's evidence was that his absence from the state was only temporary. We glean from the record that Teller's punishment had been assessed at confinement in the federal penitentiary for one year and six months; that he was at the time of the trial in the federal penitentiary in the state of Kansas, had been there some five or six months, and had about a year more to serve before the expiration of his sentence. His family lived in the county where the trial was had, and it may be assumed that Teller intended to return to Texas when released from prison. Appellant cites Whorton v. State, 69 Tex.Cr.R. 1, 152 S.W. 1082; Post v. State, 10 Tex.App. 579; Peddy v. State, 31 Tex.Cr.R. 547, 21 S.W. 542; Anderson v. State, 74 [fol. 47] Tex.Cr.R. 621, 170 S.W. 142; Modello v. State, 85 Tex.Cr.R. 291, 211 S.W. 944; Brent v. State, 89 Tex.Cr.R. 546, 232 S.W. 845—as supporting his proposition that, before former evidence of a witness who is out of the state may be reproduced, it is necessary that the predicate show his absence from the state to be 'permanent.' Article 749, C.C.P., provides in substance that, before the evidence of an absent witness may be used, it must be shown that he has 'removed beyond the limits of the state.' 22 Corpus Juris. § 519, states the rule which obtains in this state as follows:
>
> " 'Some authorities consider that the absence of the witness must have a character of permanency, and a mere transient absence will not suffice. * * *'
>
> "We think, where our decisions use the word 'permanent' removal or absence, it must be construed as the antithesis of 'temporary' or 'transient.' Such we understand to be the announcement in Brent's Case,

supra. If a witness should accept employment in another state for a definite term of two years, with the purpose of returning at the end of the two years, we think his absence would have a character of 'permanancy' about it. So in the present case the removal of Teller, while involuntary on his part, had a very decided character of permanency for the duration of his absence. He could not return, however much he might desire to do so, and the fact that he intended to return to Texas when his sentence expired would, in our opinion, be no bar to the reproduction of his evidence."

[6] In the appellant's third proposition, it is contended that the court erred in refusing to sustain defendant's demurrer to the State's evidence. This contention is based upon the alleged lack of corroboration of the testimony of the accomplice, Charles Henry Woods.

This Court has thoroughly studied the casemade and the testimony of all of the witnesses, and after this thorough study, cannot help but disagree with the learned counsel for the defendant on this proposition.

There were seven witnesses whose testimony each partially corroborated the testimony of the accomplice Woods. Each of these testified to a certain phase of the robbery and when these are all considered together, we feel that the testimony of Woods is certainly corroborated, as did the jury in this case.

This Court has by numerous decisions established the principle that is set forth in our statutes:

"A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show[s] the commission of the offense or the circumstances thereof." 22 O.S.A. § 742.

[7] In the instant case, corroborating witnesses placed the accused with the other perpetrators of this crime, during the planning stages. Further testimony of independent witnesses established the kind of automobile he was driving and the type of clothes that he was wearing. Also

corroborating witnesses established that one person was wearing a woman's stocking around his head, as the accomplice Woods said the accused was. Then, finally, several months after the robbery the accused in the presence of another corroborating witness pointed out the door through which the robbers entered during the robbery. These certainly seem sufficient to corroborate the accomplice Woods and this Court has held that where the sufficiency of the evidence to corroborate an accomplice is challenged this Court will take the strongest view of the corroborating testimony that such testimony will warrant, and, if it can say that there is corroborating evidence tending to connect the defendant with the commission of [fol. 48] the offense, it will uphold the verdict. Heartsill v. State, Okl. Cr., 341 P.2d 625; Taylor v. State, 90 Okl. Cr. 283, 213 P.2d 588; Rushing v. State, 88 Okl.Cr. 82, 199 P.2d 614; Smith v. State, Okl.Cr., 278 P.2d 557; Wilcoxon v. State, Okl. Cr., 343 P.2d 194; Ringer v. State, Okl.Cr., 356 P.2d 787; and Barrett v. State, Okl.Cr., 357 P.2d 1020.

[8, 9] Also this Court said in Scott v. State, 72 Okl.Cr. 305, 115 P.2d 763:

> "It is not essential that corroborating evidence shall cover every material point testified to by [an] accomplice or be sufficient alone to warrant a verdict of guilty. If the accomplice is corroborated as to one material fact or facts by independent evidence tending to connect the defendant with the commission of the crime, the jury may from that infer that he speaks the truth as to all. Such corroborating evidence, however, must show more than the mere commission of the offense or circumstances thereof.
>
> "The weight and sufficiency of corroborating evidence is for the jury, and, where the jury has returned its verdict, this court will take the strongest view of the corroborating testimony that the evidence warrants."

And in a more recent opinion written by Judge Nix this Court has said:

> "It is not essential that evidence corroborating an accomplice shall cover every material point testified to

by the accomplice, or be sufficient alone to warrant a verdict of guilty, and if the accomplice is corroborated as to some material fact by independent evidence tending to connect [the] defendant with the crime, the jury may from that infer that he speaks the truth as to all."

Crum v. State, Okl.Cr., 383 P.2d 45.

Finally, if the corroborating testimony given in this case is applied to the rules set down by the Supreme Court of Montana in State v. Cobb, 76 Mont. 89, 245 P. 265, which rules are as follows:

"(a) The corroborating evidence may be supplied by the defendant or his witnesses.

"(b) It need not be direct evidence—it may be circumstantial.

"(c) It need not extend to every fact to which the accomplice testifies.

"(d) It need not be sufficient to justify a conviction or to establish a prima facie case of guilt.

"(e) It need not be sufficient to connect the defendant with the commission of the crime; it is sufficient if it tends to do so."

there can be no question as to the sufficiency of this testimony.

Proposition 4 was abandoned by the counsel for defendant.

[10, 11] Proposition 5 presented by the defendant is that the trial court committed error when it admitted certain evidence over the objection of the defendant's counsel. This might possibly have been a meritorious proposition had counsel for the defendant reserved an exception to the ruling of the trial court when it admitted Exhibits 15, 16, and 17. The decision of this Court in Williams v. State, Okl.Cr., 373 P.2d 85 is applicable to the decision:

"1. Errors to which no exceptions were taken will not be considered on appeal unless they are jurisdictional or fundamental in character.

"2. It is not error alone that reverses judgments of conviction[s] of crime in this state, but error plus

injury, and the burden is upon the plaintiff in error to establish to this court the fact that he was prejudiced in his substantial rights by the commission of error."

Suffice it to say that had the defendant properly reserved his exceptions, this would not constitute sufficient grounds for reversal.

The defendant is of the opinion that the trial court committed error in refusing to give his requested instructions and this is presented in his proposition 7.

[fol. 49] [12] This Court does not agree. The instructions given by the trial court certainly fairly stated the law and although more concise than the requested instructions of the defendant, a refusal to give these requested instructions would not constitute reversible error.

[13] All of the instructions given by the trial court should be considered, and where they fairly and fully present the issues involved, and no fundamental error occurs whereby the defendant has been prejudiced or deprived of a substantial right the case will not be reversed on appeal. Murphy v. State, 79 Okl.Cr. 31, 151 P.2d 69.

[14] And further it is not error for the trial court in criminal prosecutions to refuse defendant's requested instructions where substance of requested instructions is covered by given instructions. Wingfield v. State, 89 Okl.Cr. 45, 205 P.2d 320; Myers v. State, 83 Okl.Cr. 177, 174 P.2d 395.

The final proposition argued by the defendant is his proposition 8, which states that the trial court committed error when it permitted a witness to testify on behalf of the State who had not been endorsed on the information or on the list of witnesses given to the defendant by the State, over the objections of the defendant.

[15] In this proposition the defendant's counsel relies on Art. 11, § 20 of the Oklahoma Constitution, which states, in part:

"He [the accused] shall have the right to be heard by himsef and counsel; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be

called in chief, to prove the allegations of the indictment or information, together with their post office addresses."

However, this witness, Betty Mitchell, who substituted for one Bess Wilson, was not used in the case in chief, but in the subsequent hearing concerning the defendant's former convictions. He had already been found guilty, and her testimony had nothing to do with the verdict of the jury or the judgment of the court in this finding of guilty. Therefore, their reliance on this constitutional provision is without merit and not grounds for a reversal.

All of the propositions of the defendant were not discussed individually, but all questions of law have been thoroughly considered by the Court in this opinion, and the Court finds no fundamental error. Therefore, the judgment and sentence of the district court of Tulsa County is accordingly affirmed.

BUSSEY, P. J., and NIX, J., concur.

[fol. 50]

ORDER EXTENDING TIME TO LODGE RECORD ON APPEAL

Now on this 19 day of July, 1966, application having been made for additional time within which to lodge transcript of record on appeal in the above styled and numbered cause; and it appearing that the application is timely made, the Court is of the opinion that the same should be granted.

IT IS THEREFORE ORDERED that the time to lodge the record on appeal herein in the United States Court of Appeals, be and the same is extended to and including the 26th day of August, 1966.

/s/ EDWIN LANGLEY
United States District Judge

Filed July 19, 1966.

[fol. 51]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF OKLAHOMA

Filed Aug. 18, 1966, John B. Fink, Clerk, U.S. District Court, By ....., Deputy Clerk

No. 5676—Civil

JACK ALLEN BARBER, PETITIONER

vs.

STATE OF OKLAHOMA, RESPONDENT

BEFORE: HONORABLE EDWIN LANGLEY, United States District Judge, Eastern District of Oklahoma.

TRANSCRIPT OF PROCEEDINGS

In the Federal Building and Courthouse
McAlester, Oklahoma, April 13, 1966

APPEARANCES:

Mr. David K. Petty, of Arnote & Bratton, Attorneys at Law, McAlester, Oklahoma, for the Petitioner.

Mr. Charles Owens, Assistant Attorney General, State Capitol Building, Oklahoma City, Oklahoma.

[fol. 52] PROCEEDINGS

April 13, 1966

THE COURT: The Clerk will call the case.

THE CLERK: No. 5676 Civil, Jack Allen Barber vs. The State of Oklahoma.

MR. PETTY: The petitioner is ready, Your Honor. I am David K. Petty, appearing for Jack Allen Barber.

THE COURT: And you are ready?

MR. PETTY: Yes, Your Honor.

THE COURT: Are you ready, Mr. Owens?

MR. OWENS: The State is ready, Your Honor.

THE COURT: Now, this was a case that was handled by Judge Bohanon in which the Petition was denied. He asked me to hear this to determine whether the petitioner

has exhausted his State remedies, and that is what we are here for.

MR. PETTY: Yes, Your Honor, that's correct. The petitioner appealed the decision of the District Court to the Tenth Circuit Court of Appeals, and on presentation of oral argument to the Court of Appeals the Court remanded the case to this Court for determination of that specific issue, as to whether or not the petitioner had exhausted his State remedies.

In its opinion, Your Honor, the Court of Appeals stated that they could find nothing in the record which showed an allegation or a showing of exhaustion of remedies by Mr. Barber. I think it might help, at least provide a rec- [fol. 53] ord for the Tenth Circuit when the case goes back to them, if I could have some testimony from him at this time.

THE COURT: I am not quite sure, from reading the opinion, whether it's a question of fact or a question of law as to whether he has exhausted his remedies, but I will hear him and anything else that you have to offer on it, and then from the Attorney General. Then any argument that you all may have on the matter.

All right, bring Mr. Barber around.

JACK ALLEN BARBER

a witness sworn and produced in his own behalf, testified on his oath, as follows, to-wit:

THE CLERK: Be seated, please, and state your name.
THE WITNESS: Jack Allen Barber.

DIRECT EXAMINATION

BY MR. PETTY:

Q Mr. Barber, are you the petitioner in this case No. 5676, styled Jack Allen Barber, Petitioner, vs. State of Oklahoma?

A I am.

Q And this case is filed in the United States District Court for the Eastern District of Oklahoma?

[fol. 54] A Yes, sir.

Q Mr. Barber, who filed your initial pleading or Petition in this Court?

A I did.

Q Did you at any time file supplemental pleadings or additional pleadings to that Petition?

A Yes, sir.

Q Can you identify this copy as one you have filed?

A Yes, sir, that is my supplemental.

MR. PETTY: Your Honor, at this time we would like to introduce this Petitioner's Exhibit No. 1 in evidence.

THE COURT: Very well. Any objection?

MR. OWENS: No objections, Your Honor.

THE COURT: All right, it may be admitted.

Q (By Mr. Petty) Mr. Barber, I hand you what has been marked Petitioner's Exhibit No. 1 and ask you to read a paragraph from the third page of this Exhibit.

A "Wherefore Petitioner states that he has exhausted all remedies available to him."

THE COURT: Wait just a minute, let me find it, let me see what you have.

MR. PETTY: This was filed November 17, 1964, Your Honor.

THE COURT: All right, go ahead.

Q (By Mr. Petty) You stated that you did prepare [fol. 55] this pleading?

A Yes, sir.

Q Mr. Barber, do you recall—strike that.

You were convicted in the Trial Court in the State of Oklahoma for the crime of robbery, is that correct?

A Robbery With Firearms after former conviction of a felony.

Q Was this conviction by you appealed to any court in Oklahoma?

A Yes, sir, to The Oklahoma Court of Criminal Appeals.

Q And in that Appeal to The Oklahoma Court of Criminal Appeals do you know if you or you by your counsel raised the proposition that your Constitutional Rights to be confronted with witnesses against you, do you know if that was raised in this Appeal?

A Yes, it was. I believe it quoted the Oklahoma Constitution in regard to confrontation of a witness.

Q So, that the Court of Criminal Appeals had this matter of violation to your Constitutional Rights being violated, they had that matter before it?

A Yes, sir, they did.

Q And what was the decision in that case? What did the Oklahoma Court of Criminal Appeals do, did they affirm or reverse?

A They affirmed the conviction.

[fol. 56] MR. PETTY: I have no other questions of Mr. Barber.

THE COURT: Go ahead, Mr. Owens.

MR. OWENS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. OWENS:

Q Mr. Barber, you were represented on your appeal by retained counsel, weren't you?

A Yes, sir.

Q Who was he?

A Mr. Ed Parks of Tulsa.

Q After the Court of Criminal Appeals affirmed your conviction did Mr. Parks or yourself attempt to obtain a Writ of Certiorari from The United States Supreme Court?

A I attempted to, I asked Mr. Parks to file for Certiorari.

Q And you did?

A I asked him to, and then I was placed on maximum security, in the Maximum Security section of the prison immediately after my re-hearing was denied in The Oklahoma Court of Criminal Appeals.

Q So, you never did file a petition?

A Just a moment, please. When I was taken off maximum security, some 70 days later, I didn't have, I attempted to get hold of Mr. Parks and he wrote me and [fol. 57] told me he did not know how to proceed in Federal Courts. So, my former wife retained Mr. Gene Stipe of McAlester to file the Writ of Certiorari for me. I

never heard from Mr. Stipe. My mother then retained Mr. Charles Pope of Tulsa to file a Writ of Certiorari for me. I never heard from him again. During that time I ran out of time. I wrote to Mr.—Associate Justice Mr. Byron White and asked him for an extension of time in which to file for Certiorari. He granted me 30 days. Before I could get the Writ filed time had expired.

I was in lock-up, in other words Maximum Security section and was not given pencil, paper, although I requested same.

Q So, again you have not filed a petition with The United States Supreme Court, is that your testimony?

A Through no fault of mine.

THE COURT: Just answer the questions, Mr. Barber.

A Yes, sir.

Q Have you ever filed a petition for Writ of Habeas Corpus with the Court of Criminal Appeals with The State of Oklahoma?

A No, sir, I had no issues that had not already been presented to them.

Q In other words, it's your testimony that the only issue now is the question of denial of the right to be confronted by a witness?

[fol. 58] A That is not all the issues, that is one issue that I have on appeal to the Tenth Circuit now.

Q Well, you have not filed a petition for Writ of Habeas Corpus with the Court of Criminal Appeals, have you?

A It's not a remedy to me.

THE COURT: Just answer the questions, Mr. Barber.

THE WITNESS: No, sir, I have not.

MR. PETTY: I have no further questions.

MR. OWENS: I have no further questions, Mr. Barber.

THE COURT: All right, you may step down.

(Witness withdraws)

MR. PETTY: Your Honor, we feel like this allegation that is contained in plaintiff's Exhibit No. 1 to the effect that he has exhausted his remedies is a sufficient allega-

tion upon which to base our argument that he has exhausted his remedies. The United States Circuit Court for the Tenth Circuit mentioned that an allegation was essential, and at this time I would like to amend the original pleading or Petition filed in this case by Mr. Barber so there can be no question that the allegation of exhaustion of State remedies is sufficiently set forth.

THE COURT: Well, you may do so. I think, though, that the allegation supported by the testimony is sufficient. The bare allegation that he has exhausted his State remedies without stating in the application or Petition what he [fol. 59] has done in that regard is in my opinion not sufficient, but he has testified now as to what it was. I think that is sufficient to base a finding of what he has done that he considers exhausting his State remedies. You may, however, file a supplemental or amendment to the application if you wish to do so.

MR. PETTY: Fine. I would like to just make a brief presentation on points of law and cite some cases to Your Honor that will point out, I believe, that Mr. Barber has in fact exhausted his State remedies.

THE COURT: Very well, but let me see whether or not Mr. Owens has anything to present first.

MR. OWENS: No, if Your Honor please.

THE COURT: All right. Now, I can save you some time on applying to the Supreme Court for Certiorari, that is no longer required. The only question is whether there is any remedy through Habeas Corpus proceeding, I mean whether an application to the Court of Criminal Appeals through Habeas Corpus Application, I mean through Habeas Corpus would serve any purpose.

MR. PETTY: All right. The cases on that point, Your Honor, I think make it clear that to be an affective remedy or available remedy within the meaning of Section 24—2254 of Title 28 of the United States Code makes clear that that purported remedy not merely be a procedure or not merely be a futile effort on the part of the [fol. 60] petitioner. In other words, if his efforts of attempting to obtain a Writ of Habeas Corpus in The State Court, that it's plain to see that that would be a futile and useless effort, then he has no need to go through that pro-

cedure, to go through the motion. The purpose of this requirement of exhaustion of State remedies is to give the State the first opportunity to judge a particular person's allegations that his rights have been violated. The purpose is not to throw stumbling blocks or to make the going in Federal Court tougher. It's just to give the State the first opportunity. If they have had that opportunity you need not pursue an alternate procedure to give them that opportunity again.

As Mr. Barber stated on the stand when his appeal was presented to The Oklahoma Court of Criminal Appeals he raised the question in his brief to that Court that his Constitutional Rights to be confronted with witnesses against him had been violated. The Court had that matter before them, Mr. Barber knew about it, his attorney knew it when they presented that appeal. The Oklahoma Court of Criminal Appeals rendered a decision against him.

Now, there is a very recent case in The Oklahoma Bar Journal, Hampton vs. Page, and the only citation is to the Bar Journal. It's 37 O.B.A.J. 577, March 19, 1966. When this case was decided—

THE COURT: Five seventy-seven (577)?

[fol. 61] MR. PETTY: Yes, sir.

THE COURT: Thirty-seven (37) Oklahoma Bar Journal, 577?

MR. PETTY: Your Honor, I have a memorandum brief on these points that may be of aid, I have another copy.

THE COURT: May I have this?

MR. PETTY: Yes, sir. In that Hampton case, Your Honor, the Court of Criminal Appeals makes it clear that any attempt by Mr. Barber to obtain a Writ of Habeas Corpus from that Court would be futile and useless. In syllabus one the Court stated, "Where petitioner has appealed from judgment of conviction, and judgment of conviction has been affirmed, and questions raised in Habeas Corpus proceedings were in existence and known to petitioner at time of appeal, and were matters which properly should have been presented by appeal, Court of Criminal Appeals will not issue Writ of Habeas Corpus."

THE COURT: Now, we go a little bit further in this one, don't we? We have here the exact question was, in fact, considered on appeal, is that right?

MR. PETTY: Yes, sir, that's right. All it would do, all that would be accomplished by requiring the petitioner to go back to the Court of Criminal Appeals for a Writ of Habeas Corpus would be a consumption of time by making him go through the motion of a procedure that could have no possibility of any relief for Mr. Barber. [fol. 62] On page three of this memorandum that I have cited to the Court, the Fourth Circuit Court, United States Circuit Court for the Fourth Circuit in a 1960 decision, Grundler vs. The State, I have quoted a portion from that case. In that case it was stated, and in that case they quoted a United States Supreme Court opinion, "If a question is presented and adjudicated by the state's highest court once, it is not necessary to urge it upon them a second time under an alternate procedure." This was expressly held in the Brown case, which is a United States Supreme Court case. That is exactly our situation here. We have presented it once and the petitioner shouldn't be required to present it by an alternate procedure.

THE COURT: And the latter part of your brief relates to this matter of certiorari?

MR. PETTY: Yes, sir, I have cited authorities to the effect that a petition to the United States Supreme Court for review of certiorari is no longer necessary. I thought, perhaps, also it might be contended that the petitioner might have some relief under the new post appeal act in Oklahoma, but that remedy was not available when he began his proceedings, and in the cases that I have set out in order for the remedy to be available it must have been in at the time the initial petition was filed.

THE COURT: I think that is an erroneous conclusion, Mr. Petty. The Supreme Court has held in a case against [fol. 63] Nebraska, I believe, that where a remedy does develop the case will be remanded to give the state an opportunity, but the statute that you have reference to relates to being denied the Constitutional right of appeal. That is not involved here.

MR. PETTY: Yes, sir. In any event it wouldn't be an available remedy.

THE COURT: I agree with you that it's not applicable here.

MR. PETTY: That concludes my presentation, Your Honor. We would request that this Court make a finding that petitioner has exhausted all available State remedies and that his petition for Writ of Habeas Corpus is correctly before this Court.

THE COURT: All right. I will hear from Mr. Owens now.

MR. OWENS: May it please the Court, I don't have any serious quarrel with counsel. I personally would like to see the Tenth Circuit Court go ahead and decide this case. I think we have a good case on its merits. However, I know that this Court wants to comply with the order of the Tenth Circuit so that Court will not have to send this case back again, and likewise so do I want to comply with the order.

As I read that opinion of the Tenth Circuit, on page three, it seems the court is concerned not that this ques-[fol. 64] tion was, or was not presented to the Court of Criminal Appeals, and we know that the question was before the Court and so does the Tenth Circuit Court know. However, the Court says that the issue of confrontation as a Constitutional matter now raised by the petitioner was not presented to or passed on by the State Court as is considered only the issue of whether or not The Oklahoma rule as to absent witnesses has been complied with. As I read the order the Tenth Circuit Court is saying that the Court of Criminal Appeals merely looked to see whether the statutory rule was complied with, whether the State met all the elements. The Court satisfied itself that it did, but the Tenth Circuit is saying that the State did not go further to determine whether the statute itself might be unconsitutional as a deprivation of a right of a defendant to be confronted by witnesses against him. It seems the Court wants the State Court to look at that statute and determine whether it's constitutional. Perhaps the Court of Criminal Appeals would do this by way of petition for Writ of Habeas Corpus.

Again, I have no quarrel with counsel, except I don't see how the petitioner can be harmed by filing a petition for Writ of Habeas Corpus with the Court of Criminal

Appeals presenting the question of whether that statute is constitutional.

THE COURT: Well, the time, of course, that it takes is the only real—

MR. OWENS: Yes. I think the Court of Criminal [fol. 65] Appeals has determined the question and would determine a petition adversely against this petitioner, but I cannot presume to speak for the Court.

THE COURT: Let me hear from Mr. Petty on this point, will you please?

MR. PETTY: Your Honor, I think the opinion of the Tenth Circuit makes it clear that the only question that this Court is to decide is whether or not the petitioner had exhausted his remedies in the State Court. Now, as to this question of whether or not the statute, the Oklahoma Statute is constitutional, I didn't get the impression at all that the Tenth Circuit was trying to tell the Oklahoma Court to make a constitutional determination, or rather a determination whether that statute was constitutional.

Now, petitioner has testified, and in his brief, and I think I set it out in the brief I sent to the Court, and the brief to the Court of Criminal Appeals his contention of his right to be confronted with witnesses against him was violated. The Oklahoma Court of Criminal Appeals had this matter before them. Now, the fact that they didn't say anything about it is not petitioner's fault. I think there are Federal cases to that affect that there is no way petitioner can compel an Appellent Court to make a specific finding on every point he raises. It is his obligation to raise the points and once that point having been raised [fol. 66] his obligation is satisfied.

THE COURT: Well, if I didn't have this opinion in front of me I would be disposed to agree with you, Mr. Petty. I should think that if the petitioner raised the issue of the constitutionality or denial of his constitutional rights to be confronted with witnesses on appeal and the Court of Appeals ignored it, then, it would constitute a rejection of his position. And certainly I hage to see the time it will take, when I think you and I both agree it will probably take, unless there is a change on the part of

the Court of Criminal Appeals in these matters, will be a foregone conclusion, the denial of his application for a Writ of Habeas Corpus. But, the Court of Appeals, as Mr. Owens pointed out, says that the issue of confrontation as a constitutional matter now raised by the petitioner was not presented to the Court of Appeals. Now, it's your contention that it was presented.

MR. PETTY: Yes, sir.

THE COURT: But they find differently. Now, what the basis for that finding is, I don't know. I have got to accept their finding in the matter.

MR. PETTY: Your Honor, I have a copy of the brief that petitioner filed in the Court of Criminal Appeals where this point was raised. I would be happy to put him back on the witness stand, if you think that would help any, but I think it established that this matter was, in [fol. 67] fact, raised, and I think the Circuit Court is the Court that makes the factual determination, and I think that probably would carry some weight with the Circuit Court.

THE COURT: Well, if the matter of presenting it to the Court of Criminal Appeals were controlling I think it might be advisable to do it.

MR. PETTY: There are cases to that effect that I didn't cite in this brief because I didn't feel it was necessary, that question hadn't been raised.

THE COURT: It considered only the issue of whether or not the Oklahoma rule as to the absent witness had been complied with. There is a further matter that none of us seems to have paid much attention to and that relates to the examination by the—the opinion of the Oklahoma Court recites that the attorney for the petitioner cross-examined the witness Woods during the course of the preliminary hearing. This did not occur, as the State now concedes. The decision by the Oklahoma Court of Criminal Appeals was handed down prior to the decision of Farmer against Texas, that is the case that held where testimony was taken at a preliminary hearing and was used against an individual that it was a critical stage of the proceedings. Now, what you are doing, they went ahead to say that no showing was made on this point, that is on exhaustion of State remedies.

MR. PETTY: Yes, sir.

[fol. 68] THE COURT: And, of course, there was no finding on this point.

MR. PETTY: I might mention, Your Honor, that Judge Bohanon in his initial statements at this first hearing of this case, in his preliminary statements to the petitioner and counsel, made the statement that petitioner had exhausted his State remedies but that was the only statement in the record, there was no testimony to that affect nor apparently any presentation made to him on that point.

THE COURT: Well, I would like very much to hold that Mr. Barber had exhausted his State remedies and let the Court of Appeals go ahead and get this matter decided on its merits. I have a very strong feeling that if I do it is going to prove in the end a good deal more wasteful in time than it would if he would go ahead and file an application for a Writ of Habeas Corpus with the Court of Criminal Appeals.

MR. PETTY: If it would be—

THE COURT: And get it out of the way.

MR. PETTY: If it would be helpful to Your Honor I would be happy to file an addition to this brief that I have supplied this morning to the affect that the petitioner's only obligation is to raise the question, to put the question forth, and, of course, once he does that and there is a ruling in the case the matter has been considered.

THE COURT: How do you overcome this, what testi-

[fol. 69] mony or evidence have you got that this issue of confrontation as a constitutional matter was not presented to the State Court? Do you know what they base that statement on?

MR. PETTY: No, sir, Your Honor, I don't. I have a copy of this petitioner's brief filed in the State Court where that question was raised.

THE COURT: Do you think I would be well advised to find that the Court of Appeals is wrong in its finding in that regard?

MR. PETTY: Well, I am not sure, I don't think the Court of Appeals intended that statement as a finding of fact.

THE COURT: Well, I am going to give you—what have you got that would show me that it was, in fact, presented to the Court of Criminal Appeals?

MR. PETTY: I have a copy of the petitioner's brief.

THE COURT: Does it contain a reference to the record or something of that character? I am not talking about presenting it to the Court of Appeals, I am talking about the Criminal Court of Appeals, the State Court.

MR. PETTY: Yes, that is the one I am referring to.

THE COURT: You mean you have a copy of the brief that was before the State Court?

MR. PETTY: Yes, sir.

THE COURT: Well, I think it might be a good idea, if you think this is determinitive. What about the Peti- [fol. 70] tion that was filed in the Criminal Court setting out the issues, do you have that? In other words, was this issue raised for the first time in the brief or was it made a basic part of the appeal?

MR. PETTY: Your Honor, all I have is a copy of the brief.

THE COURT: Why don't you introduce it in evidence, then, if Mr. Owens has no objection.

MR. PETTY: May we have a stipulation that this is admissable, Mr. Owens?

MR. OWENS: Yes.

THE COURT: You want to introduce in evidence as Exhibit No. 2 a copy of the brief?

MR. PETTY: Before the Court of Criminal Appeals for the State of Oklahoma.

THE COURT: All right, without objection it may be admitted.

MR. PETTY: The objection, Your Honor, begins at page four of that brief, down at the bottom of that page, and I think it continues through about page 10.

THE COURT: "The State, over the continuous and strenuous objection of the defendant was allowed to introduce the testimony of Charles Henry Woods, the State's key witness, by transcript taken at the preliminary hearing. We contend that the Court committed reversible [fol. 71] error in allowing said testimony to be introduced by transcript."

Well, that is a reversible error under the State law. Where does it refer to the use of the testimony as a constitutional violation?

MR. PETTY: On over, I think, about page 10, nine or 10. The reference by Mr. Barber's attorney in that brief is to the provision in the Oklahoma Constitution to the right of confrontation of witnesses, which is identical to the constitutional provision of the United States Constitution.

THE COURT: Well, it will take a closer reading of this than I can make now. I will look at it later to determine whether the brief supports your contention.

Now, that is all that you have to support your position that actually the matter was presented for review to the Court of Criminal Appeals?

MR. PETTY: One other thing occurs to me, Your Honor, and I don't recall without looking, but I have the opinion of the Court of Appeals with me, and I don't recall specifically but I think they make mention of that point in their decision.

THE COURT: Well, do you want to introduce a copy of the opinion? I am sure Mr. Owens doesn't have any objection.

MR. OWENS: No, I have none.

MR. PETTY: Yes, Your Honor, I would.

THE COURT: Offer it as Petitioner's Exhibit No. 3, then. The opinion which has been marked as Exhibit 3 [fol. 72] will be admitted without objection.

I think that I will wait and read the opinion separately, too.

Now, is that all you have?

MR. PETTY: This is all we have, Your Honor.

THE COURT: Mr. Owens, do you have anything that would be helpful in determining if I should overrule the Court of Appeals in this matter?

MR. OWENS: Your Honor, I only have the copy of the opinion and the Court of Criminal Appeals Decision.

THE COURT: The matter that is covered in the brief has to have been made an issue with the Court of Criminal Appeals on the application, doesn't it, on the petition for review in the Court of Criminal Appeals?

MR. OWENS: Yes, Your Honor. Usually the Court only considers things raised in the brief unless some fundamental error is obvious.

THE COURT: Are they required to set out the issues any previous time other than notice of appeal?

MR. OWENS: Only some general positions are set out in the Petition in Error, Your Honor, those are usually a statement that errors of law were committed and errors of fact.

THE COURT: There is no specific statements of the issues which has the effect of confining you to those issues the way we have in the Federal jurisdiction?

[fol. 73] MR. OWENS: No, Your Honor, there is not. I have one observation, Your Honor, if I may.

THE COURT: All right.

MR. OWENS: Again I'm not quarreling with this, and again I think we are ignoring that part of the order passed on by the State Court. The fact they were raised in the brief does not appear to be controlling here. I personally think that what the Court wants is a petition for the Writ of Habeas Corpus in the nature of a Petition for Re-hearing stating to the Court that although you have ruled on this question we submit that you have overlooked this point. Although you have said that the statute was complied with we submit that you have not passed on the constitutionality of the statute.

THE COURT: I think you are right that that is the determination that has to be made. I will examine the brief and I will examine the opinion carefully. I will tell you this, Mr. Petty, unless it's clear the State Court did have the matter before them, and that it was not overlooked, then, I think under the order of the Court of Appeals I have no alternative but to require, if the petitioner is to proceed further here, that he exhaust his State remedies by making an application on these points for a Writ of Habeas Corpus to the Court of Criminal Appeals. I am just as anxious as the rest of you, though, to avoid a use-

[fol. 74] less requirement, and if I find, incidentally, that he has not exhausted his State remedies, and I want it to be clear for the record, that this matter has been taken up and the Court of Appeals has been given an opportunity to rule on it, if I find that that has not been done I

have no alternative than to order the Petition dismissed for the reason he has failed to exhaust State remedies, and unless that is done the Court has no jurisdiction. It is actually a fundamental jurisdiction question. But, we shall see. If it is there it rests where you suggest, in the brief and in the opinion, isn't that correct?

MR. PETTY: Yes, sir, that is right.

THE COURT: And we have Mr. Barber's testimony as to what he actually did. It's not clear to me from the opinion entirely whether they couldn't tell whether he filed an application for a Writ of Habeas Corpus or not, but the record is clear he has not, it's solely a question of whether or not the constitutional question has been considered.

Do you want to submit a brief on this matter of presentation?

MR. PETTY: Your Honor, to you?

THE COURT: Yes.

MR. PETTY: Yes, sir, I certainly will.

THE COURT: Well, how soon could you get it in?

MR. PETTY: Would 20 days be excessive? The reason I ask, I am involved right now in a brief with the [fol. 75] Tenth Circuit.

THE COURT: What is today, the 13th?

MR. PETTY: Yes, sir.

THE COURT: I will give you until the 9th of May. Mr. Owens, if you want to submit any kind of a brief I will ask you to do so simultaneously, I don't want to delay the matter any more than we have to in arriving at a decision here. In the brief that Mr. Petty wants to submit it relates to whether there was a showing that there had been a presentation of the issue to the State Court and the State Court doesn't pass on it it constitutes a rejection of that proposition. Now, isn't that it, Mr. Petty?

MR. PETTY: Yes.

THE COURT: If you feel that is not the case and want to present any authorities to me, do so by the 9th of May.

MR. OWENS: Yes, Your Honor.

THE COURT: All right. Anything further to come before the Court in this case?

MR. PETTY: No, Your Honor.
MR. OWENS: No.

[fol. 76]

CERTIFIED A TRUE TRANSCRIPT

/s/ Stephen D. Allen
STEPHEN D. ALLEN
Official Court Reporter
United States District Court for the
Eastern District of Oklahoma

[fol. 79] CERTIFICATE OF CLERK

UNITED STATES OF AMERICA:

ss

EASTERN DISTRICT OF OKLAHOMA:

I, JOHN B. FINK, Clerk of the United States District Court, in and for the Eastern District of Oklahoma, do hereby certify that the annexed and foregoing is a true and correct copy of the original pleadings and proceedings in 5676 Civil; Jack Allen Barber, Plaintiff, vs. State of Oklahoma, Defendant, and now remaining among the records of the said court in my office.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of the aforesaid court at Muskogee, Oklahoma, this 19 day of August 1966.

JOHN B. FINK
Clerk, U. S. District Court

By: Lewis Vaughn
Chief Deputy Clerk

[SEAL]

Filed, United States Court of Appeals, Tenth Circuit
Aug. 26, 1966, Robert B. Cartwright, Clerk

[fol. 80] Pleas and proceedings in the United States Court of Appeals for the Tenth Circuit at the various terms in 1966 and 1967.

Order granting appellant leave to appeal in forma pauperis

Thirtieth Day, July Term, Friday, August 26th, 1966.

Before Honorable Alfred P. Murrah, Chief Judge.

On application of appellant, and for good cause shown, it is ordered that appellant may docket this cause instanter, which is accordingly done, and prosecute the appeal without being required to prepay fees or costs or to give security therefor, and that the appeal may be considered upon a certified typewritten transcript of the record and typewritten copies of appellant's brief.

It now appearing that the appellant is a poor person and unable to employ counsel, it is further ordered that C. E. Barnes, Esquire, be and he is hereby designated and assigned as counsel for appellant to prosecute the appeal in this cause.

(A copy of the transcript of record is incorporated herein and made a part hereof by reference.)

[fol. 81] And thereafter the following proceedings were had in the United States Court of Appeals for the Tenth Circuit.

Order: Cause argued and submitted.

Third Day, November Term, Wednesday, November 16th, 1966.

Before Honorable Jean S. Breitenstein and Honorable Bailey Aldrich, Circuit Judges, and Honorable Ewing T. Kerr, District Judge.

This cause came on to be heard and was argued by counsel, C. E. Barnes, Esquire, appearing for appellant, Charles L. Owens, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

[fol. 82]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9015 - November Term, 1966

Filed, United States Court of Appeals, Tenth Circuit
Dec. 30, 1966, Robert B. Cartwright, Clerk

JACK ALLEN BARBER, APPELLANT

v.

RAY H. PAGE, WARDEN, APPELLEE

Appeal from the United States District Court for the Eastern District of Oklahoma

---

C. E. Barnes for Appellant.

Charles L. Owen, Assistant Attorney General (Charles Nesbitt, Attorney General of Oklahoma, was with him on the brief), for Appellee.

Before BREITENSTEIN and ALDRICH*, Circuit Judges, and KERR, District Judge.

BREITENSTEIN, Circuit Judge.

[fol. 83] OPINION

For the second time, appellant appeals from a judgment denying him, a state prisoner, habeas corpus relief. In Barber v. Page, 10 Cir., 355 F.2d 171, we remanded because the record did not show that appellant had exhausted his state remedies. The district court held a second evidentiary hearing, found that the state remedies had in fact been exhausted, and denied relief.

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* Sitting by designation.

The only point for consideration is whether the appellant was denied his Sixth Amendment right to be confronted by the witnesses against him. He, an individual named Woods, and at least one other were charged with robbery. At a preliminary hearing, an attorney named Parks was retained to represent both appellant and Woods. Woods was called to the stand. The attorney advised him of his right to claim the privilege against self-incrimination. After a recess, the attorney requested, and was granted, leave to withdraw as attorney for Woods. In the presence of appellant and his attorney, Woods testified and incriminated the appellant. He was not cross-examined [fol. 84] by appellant's attorney, Parks, but was by the attorney for other accused.

At the trial, a transcript of Woods' testimony at the preliminary hearing was received in evidence over appellant's objections. Appellant was convicted and the judgment was affirmed by the Oklahoma Court of Criminal Appeals. Barber v. State, —— Okl.Cr. ——, 388 P.2d 320. Woods was not present at the trial because he was then an inmate of a federal penal institution located in Texas. In the circumstances presented Oklahoma permits a transcript of the testimony to be used at the trial. Id. at 324.

Pointer v. Texas, 380 U.S. 400, 403-406, holds that the right of confrontation includes the right of cross-examination and is binding on the states. In that case, the transcribed testimony of the out-of-state witness was taken in a preliminary examination where the accused was not represented by counsel.

[fol. 85] Appellant says that the state was not diligent in securing the attendance of Woods at the trial. He was not subject to Oklahoma process. Although an application could have been made to a federal court for a writ of habeas corpus ad testificandum, the grant of such a writ is discretionary. Gilmore v. United States, 10 Cir., 129 F.2d 199, 202. In our opinion a state is not required to ask a federal court for a discretionary writ and have it denied before the state can use a transcript of the testimony of an out-of-state witness. This is not a case like Motes v. United States, 178 U.S. 458, 471, where

the witness had escaped through the negligence of the government. Pointer was decided on the denial of confrontation—not on the use of the transcribed testimony of an out-of-state witness.

In the case at bar the accused had retained counsel present at the preliminary hearing and counsel had an [fol. 86] opportunity to cross-examine. Failure to exercise the right of cross-examination is no ground for asserting denial of the right of confrontation. We are not impressed with the contention that the attorney was in a doubtful position because of his previous representation of Woods. He had withdrawn and his obligation was to the appellant, who must have been satisfied because we note that he was represented by the same attorney on his appeal to the Oklahoma Court of Criminal Appeals. The appellant's belated attempt to inject ethical considerations of the attorney-client relationship into the case does not entitle him to federal habeas relief.

Affirmed.

[fol. 87] ALDRICH, Circuit Judge, dissenting.

No question of fact is involved in this case, but an important Constitutional issue. The right of confrontation, although but recently imposed upon the states, is an old and valuable right. Kirby v. United States, 1899, 174 U.S. 47. I do not take it that the extension by Pointer v. Texas, 1965, 380 U.S. 400, was only half-hearted; we must be guided fully by the Supreme Court decisions. The esteem in which the Court holds this right is illustrated by its recent case of Parker v. Gladden, —— U.S. ——, 12/12/6. Cf. Brookhart v. Janis, 1966, 384 U.S. 1.

In situations of necessity, the importance of the public interest may qualify the right of a defendant to be condemned by a witness the jury can see and appraise. This must mean, however, a real necessity, not a token one. Motes v. United States, 1900, 178 U.S. 458, clearly holds that mere unavailability of a witness is not enough; if the prosecution wants to use a witness's prior testimony it first has a duty to try to produce him. Were

[fol. 88] there no such duty, the Court could not have relied on the negligence involved in the government's failure to have the witness in that case. The significance of Motes is pointed up by the fact that there, unlike the present case, the defendant had cross-examined the witness on the prior occasion. Nonetheless, the Court found a denial of confrontation.

Although my brethren use the word "diligent," I do not see how a state can be said to be diligent when it made no effort whatever. While the federal authorities, in their discretion, could have refused to let the witness be taken 226 miles. it would seem an unusual case in which the application for such a writ could be properly denied. In any event, the possibility of a refusal is not the equivalent of asking and receiving a rebuff. While I am not happy about the court's somewhat offhand dismissal of the reasons petitioner's counsel may have had for not cross-examining his former client at the preliminary hearing, I am more than unhappy to see confrontation dispensed with because the state did not choose to seek it.

[fol. 89] JUDGMENT

Thirty-Third Day, November Term, Friday, December 30, 1966.

Before Honorable Jean S. Breitenstein and Honorable Bailey Aldrich, Circuit Judges, and Honorable Ewing T. Kerr, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

[fol. 90]

PETITION FOR REHEARING

JUDGES BREITENSTEIN, ALDRICH & KERR

Vocational Training School

RAY H. PAGE, WARDEN — CLINT J. GLADDEN, DEPUTY WARDEN — LEE C. JOHNSON SUPERVISOR — PARK ANDERSON, ASST. DEPUTY WARDEN — MACK H. ALFORD, CAPTAIN

Inmate's No. 67027
Name Jack A Barber
To U.S. Court of Appeals
Relation Business
R. F. D. or Street No.
City Denver
State Colorado 80202

RULES FOR WRITING AND VISITING

All inmate mail is opened, censored and recorded by OFFICIALS. Inmates are permitted to receive one letter per day from persons on their mailing list. No incoming letters shall exceed four pages or contain a letter from another person. Sign with your full name. Write plainly regarding buisness or family matters only. Address letters to: Inmate's Name, his Number, P. O. Box 128, Stringtown, Oklahoma—74569.

ARTICLES INMATES MAY RECEIVE: News-papers and books of proper character direct from publishers, shoes, socks, underwear and handkerchiefs, table model radios, small fans and family photos. Nothing else unless advance permission has been obtained through the Capt.'s Office. SEND, DO NOT BRING TO INSTITUTION. Do not put old or new letters in packages. In sending money to inmates, send money orders (Postal or Railway Express) or cashiers checks, DO NOT SEND CASH OR STAMPS.

TRAINING SCHOOL INMATES: will receive visitors ONLY on SATURDAY AFTERNOONS: between the hours of 12:30 and 4:00 P.M., SUNDAYS from 8.30 A. M. to 4:00 P.M.

LETTERS INCOMING AND OUTGOING MUST BE SIGNED WITH FULL NAME OF WRITER.

P. O. Box 128
Stringtown, Okla.—74569 Jan. 18 1967

Via Certified Mail

United States Court of Appeals
Tenth Circuit

JAN 30 1967

William L. Whittaker
Clerk

In Re: No. 9015, Jack Allen Barber, appellant, vs. Ray H. Page, Warden, respondent.

May It Please The Court:

On December 30, 1966 the Court handed down its opinion in the above referred case, denying habeas corpus ac coram nobis.

Please be advised that as the appellant in this case, I do not agree with the Court in its opinion, nor am I satisfied that justice has been done. Therefore, it is my sincere and humble desire to pursue this matter further, either by requesting a rehearing before the entire Court, or by prosecuting an appeal for certiorari to the United States Supreme Court.

Mr. C. E. Barnes, of Oklahoma City, Oklahoma was appointed by the Court to represent this case on appeal. I sincerely believe that Mr. Barnes has done a remarkable

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Inmate's No. 67027
Name Jack A. Barber
To U.S. Court of Appeals
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City (Cont'd page two)
State

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LETTERS INCOMING AND OUTGOING MUST BE SIGNED WITH FULL NAME OF WRITER.

P. O. Box 128
Stringtown, Okla.—74569 Jan. 18, 196

Job, despite the fact that he has not practiced criminal law in the past twenty years, prior to this appointment. I must assume that Mr. Barnes has now fulfilled his obligation to this case. Therefore, I am requesting the Court to appoint other counsel, and respectfully suggest that such counsel reside or practice law in Washington, D. C., in the event an application for certiorari to the United States Supreme Court is made. Also, as the appellant in this case, I further request an extension of time which will permit such counsel to prepare and file any necessary action relative to the instant cause, and includes proceeding in forma pauperis.

Respectfully Submitted,

Jack Allen Barber

Jack Allen Barber
#67027

CC: Mr. C. E. Barnes,
Attorney At Law,
Hightower Building,
Oklahoma City, Okla. 73102

[fol. 92]

Order denying petition for rehearing en banc

Seventh Day, March Term, Friday, March 24th, 1967.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth and Honorable John J. Hickey, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing en banc herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition for rehearing en banc be and the same is hereby denied.

Order denying petition for rehearing

Before Honorable Jean S. Breitenstein and Honorable Bailey Aldrich, Circuit Judges, and Honorable Ewing T. Kerr, District Judge.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[On April 4, 1967, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the Eastern District of Oklahoma.]

[fol. 93] Clerk's Certificate

United States Court of Appeals, Tenth Circuit.

I, William L. Whittaker, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the transcript of the record from the United States District Court for the Eastern District of Oklahoma, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Court of Appeals for the Tenth Circuit in a certain cause in said United States Court of Appeals, No. 9015, wherein Jack Allen Barber was appellant and the State of Oklahoma was appellee.

I do further certify that the original files filed herein remained on file herein until April 4, 1967, at which said time the said original files were returned to the United States District Court for the Eastern District of Oklahoma.

In testimony whereof, I hereunto subscribed my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 10th day of April, 1967.

[SEAL]

/s/ William L. Whittaker
Clerk of the United States Court
of Appeals, Tenth Circuit.

[fol. 94]

SUPREME COURT OF THE UNITED STATES

No. 55 Misc., October Term, 1967

JACK ALLEN BARBER, PETITIONER

v.

RAY H. PAGE, WARDEN

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 703 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 9, 1967

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